

## ORDINANCE

**AN ORDINANCE ("FRANCHISE ORDINANCE") GRANTING TO PUBLIC SERVICE COMPANY OF NORTH CAROLINA, INCORPORATED, A SUBSIDIARY OF SCANA CORPORATION, ITS SUCCESSORS AND ASSIGNS, THE RIGHT TO USE AND OCCUPY THE PUBLIC WAYS OF THE CITY OF DURHAM, NORTH CAROLINA, FOR THE CONSTRUCTION, OPERATION AND MAINTENANCE OF A GAS UTILITY SYSTEM AND ALL NECESSARY MEANS FOR TRANSMITTING AND DISTRIBUTING GAS WITHIN SAID CITY FOR A PERIOD OF 30 YEARS.**

**WHEREAS**, Public Service Company of North Carolina, Incorporated proposes to continue to construct, operate and maintain a Gas Utility System and all necessary means for transmission and distribution of gas within the City of Durham, North Carolina; and

**NOW, THEREFORE, BE IT ORDAINED** by the City Council of the City of Durham, North Carolina as follows:

**SECTION 1. SHORT TITLE** This ordinance shall be known and may be cited as the "PSNC Gas Franchise".

### **SECTION 2. DEFINITIONS**

For the purposes of this ordinance, the following terms, phrases, words, and their derivations shall have the meaning given herein. When not inconsistent with the context, words used in the present tense include the future, words in the plural include the singular, and words in the singular include the plural. The word "shall" is always mandatory and not merely directory.

(a) **BUSINESS RECORDS** shall mean all documents, papers, letters, plats, maps, books, photographs, films, sound recordings, magnetic or other, tapes, electronic data-processing records, artifacts or other documentary material regardless of physical form or characteristics made or received by the

Company as a result of the construction, operation or maintenance of the gas system that is the subject matter of this Franchise Ordinance.

- (b) **CITY COUNCIL** shall mean the governing body of the City of Durham, North Carolina, as now or hereafter constituted.
- (c) **COMPANY OR PSNC** shall mean Public Service Company of North Carolina, Incorporated, a subsidiary of SCANA Corporation, its successors and assigns.
- (d) **CITY** shall mean the City of Durham, North Carolina, including its present and future boundaries.
- (e) **DEPARTMENT OF TRANSPORTATION** shall mean the North Carolina Department of Transportation or its successor.
- (f) **GAS** shall mean natural gas, mixed gas and substitute fuels carried over the Company's facilities as authorized by the North Carolina Utilities Commission.
- (g) **GAS UTILITY SYSTEM** shall mean all facilities of the Company in the City used for the transmission or distribution of Gas within the City.
- (h) **F.E.R.C.** shall mean any reference made to the Federal Energy Regulatory Commission or its successor.
- (i) **COMMISSION** shall mean the North Carolina Utilities Commission or any successor body lawfully constituted.
- (j) **PERSON** shall mean any person, firm, partnership, association, corporation, company, entity, or organization of any kind.
- (k) **PUBLIC RIGHT OF WAY** shall mean the public roads, streets, and alleys, and public area adjacent to the built-upon areas of such roads, streets, and

alleys, that are located within the City of Durham and over which the City has jurisdiction or exercises control at the time of the commencement of this franchise, as well as those additional areas incorporated into the City during the term of this franchise.

- (l) **GOOD UTILITY PRACTICES** shall mean the practices, methods and acts engaged in or approved by a significant portion of the gas industry during the relevant time period or other practices, methods and acts which, in the exercise of reasonable judgment in light of the facts known at the time the decision was made, could have been expected to accomplish the desired result consistent with reliability, safety, expedition, requirements of governmental agencies having jurisdiction, and at the lowest reasonable cost. The term Good Utility Practices is not intended to be limited to the optimum practices, methods or acts to the exclusion of all others, but rather to constitute a spectrum of acceptable practices, methods, or acts.

### **SECTION 3. GRANT OF AUTHORITY**

The right, power and authority is hereby granted to and vested in the Company to construct, install, replace, repair, maintain and operate gas mains, pipes, equipment, service lines, communications lines, facilities and other appurtenant apparatus of the gas system within the public right of way, for the purpose of operating a natural gas system along, across, and under the streets, alleys, bridges, rights-of-way, and other public places of the City together with any necessary rights of access thereto; and to use that natural gas system to conduct a gas business. This granting of authority is provided that the City, as of the applicable time, has jurisdiction or exercises control of

the public ways. This Franchise Ordinance shall also permit the Company to exercise the rights granted herein, but does not eliminate the need to seek additional approvals from the state for Public Rights of Way under the control of the Department of Transportation.

#### **SECTION 4. CONDITIONS ON USE OF PUBLIC WAYS**

- (a) The Company shall construct, operate and maintain its gas system in compliance with all applicable ordinances of the City, which address, among other things: location of facilities; conditions on excavation; permitting; fees; inspections; timing of work; submission of information, plans, and maps; relocation of Company facilities; removal of company facilities; protection of trees; and repair and restoration of damaged areas.
- (b) No street, alley, bridge, right-of-way or other public place used by the Company shall be obstructed longer than reasonably necessary during its work of construction or repair, and shall be restored to the same good order and condition as when said work was commenced. No part of any street, alley, bridge, right-of-way, or other public place of the City, including any public drain, sewer, catch basin, water pipe, pavement or other public improvement, shall be injured. However, should any such damage occur due to the Company's failure to use due care, the Company shall repair the same as promptly as possible, and, in default thereof, the City, after written notice and opportunity for the Company to repair, may

make such repairs and charge the reasonable cost thereof and collect the same from the Company. The Company shall save the City harmless from liability (including judgment, decrees, and legal court costs) resulting directly from its negligence and failure to use due care in the exercise of the privileges hereby granted or of its rights under this Section. Waiver by either Party of any rights under this section shall not be deemed a waiver of said rights in the future.

- (c) All work upon the streets and public places of the City shall be done under the general supervision of the City Manager or their designee or other legally constituted governing body of the City, and that all sidewalks or street pavements or street surfaces which may be displaced by reason of such work shall be properly replaced by the Company, its successors and assigns, to the reasonable requirements of the City.

## **SECTION 5. ANNEXATION NOTIFICATION**

The City shall mail or email notice to the Company of areas annexed into the City. Said notices shall include pertinent maps and/or tax map numbers, so that newly annexed customers may be identified.

## **SECTION 6. SERVICE**

- (a) The Company may supply any form of gas containing approximately one thousand (1,000) BTU's per cubic foot, and its obligation in respect thereto shall

continue only so long as it is able to reasonably obtain an adequate supply of such gas satisfactory for service hereunder, provided, however, that in the supply of such gas the customers within the City shall enjoy equal rights with respect to other similar customers served by the Company consistent with Commission rules and regulations.

(b) The Company shall, as to all other conditions and elements of service not fixed herein, be and remain subject to the rules and regulations of the Commission, Department of Transportation, and F.E.R.C. or its successors, applicable to gas service in the City.

#### **SECTION 7. NONEXCLUSIVE GRANT AND TERM**

(a) The gas franchise granted by this Franchise Ordinance is not exclusive. The City may grant the same or similar rights and privileges to other certified persons or companies at any time, provided that any such grants shall be made under terms and conditions which do not materially impair the exercise of the rights and privileges granted to the Company under this franchise.

(b) Upon ratification and acceptance, this franchise shall constitute a contract between the City and the Company, and shall be in force and effect for an initial term of 30 years, and shall continue in force and effect year-to-year thereafter until properly terminated by either party. Either party may terminate this Franchise Ordinance at the end of its initial term or its anniversary date any year thereafter, by giving written notice of its intention to do so no less than one (1) year before the proposed date of termination.

#### **SECTION 8. FRANCHISE NOT WAIVER OF LAW**

This franchise is subject to the constitution and laws of the State of North Carolina, and it not a waiver of any present or future law or regulation. This franchise is not a limitation of the authority of the City to enact any new ordinance or policy that does not diminish, conflict or impair the rights and authority granted to the Company.

#### **SECTION 9. REGULATIONS, SAFETY AND CUSTOMER SERVICE**

(a) The Company shall maintain and operate its gas system in a safe and efficient manner. The Company shall provide adequate, efficient and reasonable service to the consumers of its gas in the area of this franchise that meets industry standards and complies with requirements of the Commission. The Company shall comply with all present and future rules and regulations of the Commission and F.E.R.C.

(b) Gas utility service is not guaranteed to be free from interruptions, supply failure or outages by reasons of force majeure. Force majeure includes, but is not limited to, the following: (i) physical events such as acts of God, landslides, lightning, earthquakes, fires, storms or storm warnings, such as hurricanes, which result in evacuation of the affected area, floods, washouts, explosions, breakage or accident or necessity of repairs to machinery or equipment or lines of pipe; (ii) weather related events affecting an entire geographic region, such as low temperatures which cause freezing or failure of wells or lines of pipe; (iii) interruption and/or curtailment of Firm transportation and/or storage by Transporters; and (iv) acts of others such as strikes, lockouts or other industrial disturbances, riots, sabotage, insurrections or wars.

(c) The Company will restore gas utility service using Good Utility practices and shall attempt whenever possible to minimize the amount of inconvenience to its

customers when it becomes necessary to shut off or interrupt service to effectuate repairs, adjustments or installations.

(d) The Company shall maintain and operate its Gas Utility System in compliance with applicable State and Federal maintenance and safety regulations.

#### **SECTION 10. CONFLICT WITH OTHER REGULATIONS**

Where any provision of this franchise is in conflict with any rule of the Commission or F.E.R.C., so that the Company cannot reasonably comply with both the provisions of this franchise and the rule of the Commission or F.E.R.C., then the Company shall comply with such rule instead of the conflicting provision of this franchise; but the Company shall comply with all of the provisions of this franchise where such can be done without violating rules of the Commission or F.E.R.C.

#### **SECTION 11. EMERGENCY RESPONSE**

1) The Company shall at a minimum adhere to all applicable federal and state regulations regarding its duties and responsibilities in response to emergency conditions regarding the gas system.

2) The Company shall coordinate its emergency response with the City and other appropriate local emergency response agencies to promote an efficient and prompt restoration of gas to the City in the event of natural or man-made disasters. This may include the following:



a) Providing a telephone number not available to the general public whereby the City will be able to report emergency or problem situations and obtain status reports from the Company on a twenty-four-hour basis.

b) Upon request of the City, meeting with the appropriate City public safety, emergency management, public utilities and public works representatives to review and update the elements of its response and emergency plans.

c) When the City/County Emergency Operations Center (EOC) is activated, the Company will provide ongoing information to the EOC) to include a knowledgeable representative on site if deemed necessary..

## **SECTION 12. COORDINATED PLANNING**

1) The Company shall keep the City informed of plans for major maintenance and construction projects within the City and, upon request by the City, the Company shall meet with the City to discuss these future projects and plans. The Company shall work with other utilities to ensure coordinated planning relating to projects in the Public Right of Way. The Company shall coordinate its installations with the City's capital improvement programs.

2) Upon City request, the Company shall coordinate with the City to better plan or manage projects related to the Public Right of Way.

3) The Company shall designate a representative responsible for the provision of information described in this Section.

### **SECTION 13. COMMISSION RULES AND RATES**

The Company may from time to time declare, make and enforce such rules and regulations as shall have been fixed or allowed by the Commission as to the sale or distribution of Gas to any of its customers in the City. The rates to be charged for Gas at all times shall be such rates as are fixed or allowed by the Commission, including such rates as shall be negotiated by the Company with certain industrial or commercial customers pursuant to authority granted by the Commission.

### **SECTION 14. PLAT OF GAS UTILITY SYSTEM**

The Company shall maintain maps or plats of its Gas Utility System within the area covered by this franchise. Such maps or plats shall be maintained in the Company's offices, and the City shall have access to the same during any regular business hours of the Company.

### **SECTION 15. ACCESS TO BUSINESS RECORDS**

The City shall have access to the Business Records of the Company relating to the construction, operation, and maintenance of the gas system that is the subject matter of this Franchise Ordinance during normal business hours and with reasonable notice. The Company shall provide to the City a copy of such Business Record if requested by the City at the Company's expense, so long as that record would be subject to disclosure under state or federal law.

### **SECTION 16. BANKRUPTCY, SUCCESSORS AND ASSIGNS**

In the event the Company is adjudged bankrupt or its assets are placed in the hands of a receiver or other court officer, either voluntarily or involuntarily, or the properties and business of the Company are foreclosed or sold to satisfy any lien or indebtedness or obligation of the Company, then the interest, rights and remedies of the

City in respect to said properties and operations shall not be affected or prejudiced, and any receiver, assignee, trustee, purchaser or successor, whether by operation of law or otherwise, so succeeding to or representing the interest or position of the Company, shall be bound by this Franchise Ordinance and the terms and provisions hereof and shall be bound to carry out and perform the obligations and duties imposed upon the Company by this Franchise Ordinance. Likewise, if the Company reorganizes, merges, or consolidates with any other company, then the City is bound by this Franchise Ordinance.

#### **SECTION 17. TRANSFER OF FRANCHISE**

If the Company sells, transfers, assigns or leases its gas system within the City, or any substantial part thereof, it shall, before such transfer give written notice to the City Manager. This obligation shall not apply to the conveyance by the Company of a security interest in any of the Company's gas system in the City for the purpose of securing payment of the Company's secured obligations or to regular trading in listed securities on recognized markets. In the event of such transfer, the obligations and duties of this Franchise shall pass to the new owner, but no rights shall be enjoyed absent approval by the City Council of the transfer of the franchise.

#### **SECTION 18. REVOCATION**

In the event the Company fails to comply with the provisions of this Franchise Ordinance and, within sixty (60) days after receipt of written notice from the City, the Company fails to cure or remedy such default, or to have begun reasonable measures to do so, then the City may cause the Company to appear at a hearing before the City Council upon thirty (30) days prior written notice. If at such hearing the City Council should determine that the Company's failure or default has been substantial, repeated or flagrant, then upon such

determination the City may revoke and terminate this franchise; provided, however, that the Company may file with the City within ten (10) days after such determination the Company's election to appeal to the proper North Carolina court. In that event the City and Company agree that such court shall hear and determine *de novo* whether there has been substantial, repeated or flagrant failure or default by the Company of the terms, conditions or obligations of this Franchise Ordinance. Failure or default which cannot be corrected by the Company shall not be grounds for revocation or termination, unless such failure or default shall be determined to be material and continuing.

#### **SECTION 18. COMPANY TO SAVE CITY HARMLESS**

1) To the extent attributable to the Company's action or inaction, the Company shall hold harmless the City and the City's officers, agents and employees from every loss, cost, expense, claim, judgment, execution, suit or demand resulting or in any manner arising from the Company's negligence and failure to use due care in constructing, operating or maintaining a gas system, in carrying on the business of selling, transmitting or distributing gas, or in exercising or failing to exercise any right or privilege granted by this franchise.

2) To the extent attributable to the Company's action or inaction, if the City or any City officer, agent or employee acting in an official capacity is sued in any court by any person on account of the Company's negligence or failure to use due care in constructing, operating or maintaining a gas system, or carrying on the business of selling, transmitting or distributing gas, or exercising or failing to exercise any right or privilege granted by this franchise, the Company shall defend all such suits with competent legal counsel and pay the final judgment resulting therefrom to the extent

such damages arise directly from the Company's negligence and failure to use due care.

#### **SECTION 19. CITY TAKING PART IN LITIGATION**

The Company shall not object to the City's taking part, by intervention or otherwise, in any suit, action or proceeding instituted by or against the Company in which any judgment or decree or act can be rendered which forecloses on the Company's property in the City or affects the Company's operations in the City; however, this obligation is limited to those instances in which the judgment or decree would affect the rights, powers, obligations or duties of the Company under this franchise.

#### **SECTION 20. STATUTORY AUTHORITY**

This franchise is granted pursuant to Chapter VI, Article 5 of the Charter of the City of Durham, the same being Chapter 671, Session Laws of 1975, as amended, and NCGS 160A-319. The rights prescribed in Section 71 of Chapter VI, Article 5 of said Charter are reserved to the City, unless otherwise specifically provided for in this franchise.

#### **SECTION 21. SEVERABILITY, THIRD PARTY RIGHTS**

(a) If any provision in this Franchise Ordinance is determined to be invalid, void or unenforceable by any court or regulatory body having jurisdiction, such determination shall not invalidate, void, or make unenforceable any other provision, agreement or covenant of this Franchise Ordinance. This Franchise Ordinance and all provisions herein will be subject to all applicable and valid statutes, rules, orders and regulations of any

governmental authority having jurisdiction over the parties, their facilities, or gas supply, this Franchise Ordinance or transaction or any provisions thereof.

(b) The rights hereunder in this Franchise Ordinance accrue exclusively to the parties, their successors and assigns. It is the express intent of the parties that this franchise shall not create any rights in third parties.

## **SECTION 22. ACCEPTANCE**

This franchise shall be accepted by the Company in writing, through a legally effective execution and acceptance, which shall be filed with the City Clerk for recordation accompanying this Franchise Ordinance.

## **SECTION 23. EFFECTIVE DATE, TERM ADOPTION AND RATIFICATION**

This Franchise Ordinance shall be effective from and after the \_\_\_\_ day of \_\_\_\_\_, 20\_\_\_\_, provided the Company shall have executed the written acceptance hereof at the end of this Franchise Ordinance, and shall exist in force for a period of 30 years hereafter, and continue in force year to year thereafter until cancelled upon written notice of either party at least one year in advance.

(a) All other ordinances and clauses of ordinances in conflict herewith are hereby repealed.

Adopted by the City of Durham the \_\_\_\_ day of \_\_\_\_\_, 20\_\_\_\_, and hereby ratified.

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William V. Bell, Mayor

**ATTEST:**

\_\_\_\_\_  
D. Ann Gray, City Clerk

**APPROVED AS TO FORM:**

\_\_\_\_\_  
Patrick Baker, City Attorney

**ACCEPTANCE BY COMPANY**

Public Service Company of North Carolina, Incorporated does hereby accept and acknowledge the foregoing Franchise Ordinance, and in consideration of the benefits and privileges granted to it does hereby agree to the terms and conditions therein provided.

This the \_\_\_\_\_ day of \_\_\_\_\_, 20\_\_\_\_.

PUBLIC SERVICE COMPANY  
OF NORTH CAROLINA, INCORPORATED

By: \_\_\_\_\_  
D. Russell Harris  
President and Chief Operating Officer

**ATTEST:**

\_\_\_\_\_  
Carol O'Shields  
(Corporate Seal)

Its: Assistant Corporate Secretary